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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 63

FEDERAL TRADE COMMISSION, PETITIONER

v.

NATIONAL LEAD COMPANY, THE SHERWIN-WILLIAMS COMPANY, THE EAGLE-PICHER COMPANY, AND THE EAGLE-PICHER SALES COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (R. 3887–3909) is reported in 227 F. 2d 825. The opinion of the Federal Trade Commission (R. 3803–20) and the dissenting opinion of Commissioner Mason (R. 3820–41) are reported, respectively, in 49 F. T. C. D. 875 and 49 F. T. C. D. 889.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 1956 (R. 3911). The time for filing a petition for a writ of certiorari was extended by Mr. Justice Minton, on March 30, 1956, to April 19, 1956

(R. 3915). The petition for a writ of certiorari was filed on April 13, 1956, and was granted on June 4, 1956 (R. 3915). 351 U. S. 961. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

In a proceeding under Section 5 of the Federal Trade Commission Act the Commission found that for many years the respondents had been selling lead pigments, by agreement, at prices computed in accordance with a system of zone delivered prices resulting in an exact matching of the prices of other sellers and suppression of price competition. The Commission, having concluded that the respondents were thereby using unfair methods of competition in violation of Section 5, entered an order prohibiting sale, by agreement, at prices computed in accordance with such system. The order additionally prohibited each respondent individually from using such a price system for the purpose or with the effect of "systematically matching" the delivered prices of other sellers. This prohibition was imposed because, the Commission found, it was essential to achieve effective termination of respondents' past illegal conduct.

The question presented is whether the Commission exceeded its statutory authority in directing the individual respondents to cease and desist from selling lead pigments on the basis of the same kind of zone delivered price system which they had long been using by agreement.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U. S. C. 45, provides in pertinent part as follows:

> (a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> * * * * *
>
> (6) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.
>
> (b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition * * * it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing * * *. * * * If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. * * * After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any

time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* That the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

STATEMENT

This proceeding was instituted in 1944 (R. 3, 26). The amended complaint charged, so far as now material, that respondents had violated Section 5 of the Trade Commission Act by combining and conspiring to restrain and suppress price competition in the sale of lead pigments [1] (par. 6, R. 63–4). It charged that this suppression of competition was accomplished primarily by dividing the country into geographic zones

[1] As found by the court below, the three principal lead pigments are dry white lead, white lead-in-oil (which includes the so-called keg products, red lead-in-oil, etc.), and the lead oxides, red lead and litharge (R. 3889).

Dry white lead is a fine white powder used as a pigment in paints by paint and ceramic manufacturers. White lead-in-oil is white lead with linseed oil added to form a paste, and sold to painters and the general public for use as an exterior house paint after adding additional oil and dryers. Lead oxides and litharge are principally sold to manufacturers of electric storage batteries, lead oxide being the basic raw material of battery plates. (R. 3739–40.)

and charging the same delivered price to all buyers within a particular zone irrespective of the buyer's location (pars. 7B (1)–(2), 8; R. 66, 67–71). It was also alleged that each respondent uses this price system "for the purpose and with the effect of enabling the respondents to match exactly their offers to sell lead pigments to any prospective purchaser at any destination, thereby eliminating competition between and among themselves" (par. 10, R. 72).

After an extensive hearing, the Commission made detailed findings of fact (R. 3732–97), and concluded that respondents' agreements and understandings, and their acts pursuant thereto, violated Section 5 (R. 3797). The Commission's order prohibited respondents from entering into or carrying out any "planned common course of action", agreement or conspiracy to sell at prices determined pursuant to "a zone delivered price system" or any other system resulting in identical prices at the points of sale (R. 3800). The order also directed each of the present respondents [2] to cease and desist from (R. 3801)—

[2] The Glidden Company, one of the companies against which the Commission issued its complaint (R. 3) and against which it issued its order (R. 3800–3), did not petition for review of the Commission's order (R. 3889). The complaint and order were also directed against Anaconda Copper Mining Company and its subsidiary, International Smelting & Refining Company (R. 3, 3800–3), but the court below set aside the order as against these companies (R. 3888–9, 3902–4, 3912), and the petition for certiorari did not question such action. These two companies were accordingly dismissed as parties respondent per stipulation of the parties pursuant to Rule 60 of the Revised Rules of this Court (351 U. S. 921).

quoting or selling lead pigments at prices calculated or determined in whole or in part pursuant to or in accordance with a zone delivered price system for the purpose or with the effect of systematically matching the delivered price quotations or the delivered prices of other sellers of lead pigments and thereby preventing purchasers from finding any advantage in price in dealing with one or more sellers as against another.

An opinion of the Commission, filed simultaneously with its findings of fact, conclusion and order, explained its reasons for prohibiting individual use of the zone delivered pricing system. The Commission stated that respondents, during the NRA period, had established a uniform zone pricing system and had distributed maps showing the boundaries of the zones to be observed, and that subsequently each respondent had followed (with minor variations) the zone delivered price system and adhered to the zone boundaries shown on these maps (R. 3813–4). The Commission said that, in this situation, an order directing each respondent to desist from use of a zone delivered price system "is necessary * * * to make the order fully effective against the trade restraining conspiracy in which each of the respondents participated" (R. 3814). The prohibition would, in the opinion of the Commission, "eliminate the effects of" their conspiracy and "guarantee against" its continuation (R. 3815).

The Commission also stated that unless the respondents, who control practically the entire national production of lead pigments, are individually de-

prived of "the device which made their combination effective, an order merely prohibiting the combination may well be a useless gesture", and "the evils springing from the combination, one of which is to eliminate price competition, may well continue indefinitely" (R. 3815). The Commission pointed out that under the zone pricing system the delivered price is the same for every point within a zone, and that once the price in the par zone has been established and the relative price gradations in the other zones have also been established, "the system operates substantially automatically" (R. 3816). Accordingly, "the momentum of the system, so firmly and maturely established, might last for some time unless effective measures to break it up were taken"—the purpose of the prohibition running against each respondent individually (*ibid.*). The Commission further said that if competition is later restored and a proper showing is made that the individual prohibition is no longer necessary, "the Commission will, of course, at that time take such action as may be appropriate in the light of the facts and the law" (R. 3817).

The Commission's order was premised upon the facts set forth in its findings, and in particular its findings relating to conspiracy, which the court below held to be supported by substantial evidence (R. 3889).[3] Findings which appear pertinent to the issue now before this Court are set forth below.

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[3] A cross petition for writ of certiorari from the decision below, raising the question whether there was substantial evidence to support the Commission's finding of conspiracy, was denied by this Court. *National Lead Co.* v. *Federal Trade Commission*, 351 U. S. 964.

Up to 1933, a system of differential or warehouse points was commonly employed in the sale of white lead-in-oil. As of March 1933, National Lead had 589 "free delivery" or "equalization" points. Each point had a base price, and the price at other places was determined by adding to the base price the freight from the nearest equalization point. Under this system, a seller could never be sure of his competitor's price at a particular point, in the absence of advance knowledge of his competitor's listed points and of the freight rates used in making his calculations. (Fng. 6 (b), R. 3749.)

Beginning in July 1933, the members of the lead pigments industry (including respondents) participated in a series of meetings for the purpose of drafting a code of fair competition for this industry under the National Industrial Recovery Act (Fngs. 7 (b), 8; R. 3751-2). During discussions of the proposed code, the secretary of the trade association committee which was formulating a code was asked to obtain the opinion of counsel on the legality of immediate agreement among the producers to install a "Uniform Basis of Sale" for lead pigments, and counsel's advice was that the best practical solution "seemed to be the adoption of the Uniform Basis of Sale by one or more of the interested members, which could be followed voluntarily by the others, without agreement on the subject but merely because it was individually to their best interests to do so". (Fng. 8 (a), R. 3755-6.)

The meetings and discussions relative to a code resulted in the members of the industry coming to an

understanding and agreement to sell the various lead pigments "on the basis of flat delivered prices to customers within designated zones, with uniform differentials applicable as between such zones." Four separate zoning systems were thereby agreed upon and established. The zoning system for white lead-in-oil and other "keg" products comprised 12 zones, one a "par" zone, two 12½¢ premium zones, three with a 25¢ premium, one a 37½¢ premium, two a 50¢ premium, two a 75¢ premium, and one a premium of $1.00. Altogether different zones were established for dry white lead, for less-than-carload red lead and litharge, and for carload red lead and litharge. (Fng. 10 (a), R. 3761–6.)

With minor exceptions, respondents have adhered to the pricing practices agreed upon in the 1933–1934 meetings (Fngs. 13–14, R. 3772–84). The lead pigment producers agreed during these meetings not only to sell at zone delivered prices pursuant to identical geographical zones, but also to adopt uniform discounts and terms of sale and uniform differentials between various keg sizes, to sell red lead and litharge on the basis of fixed differentials over the price of pig lead as quoted by the American Smelting & Refining Company, to eliminate guarantees against price decline, and to sell white lead-in-oil on the basis of consignment contracts for the purpose of controlling resale prices and preventing competition between the producers and their customers (Fng. 10 (a), R. 3761–2, 3767). The result was to produce substantial identity in prices and in terms and conditions of sale,

and the zone pricing feature "facilitated the meeting, or matching, of competitors' prices" (Fng. 15, R. 3784–5).

The court of appeals upheld the Commission's finding of conspiracy and its order directed against concerted or conspiratorial action, but rejected the paragraph of the order directed against individual use of zone delivered pricing. The court pointed out that Section 5 (b) of the Federal Trade Commission Act provides that if the Commission finds in a proceeding brought under that section that the respondent is using an unfair method of competition prohibited by Section 5 (a), it may issue an order requiring him to cease and desist from using "such" method of competition (R. 3905). The court declared: "The section is specific; the permissible order is restricted to a prohibition of 'unfair methods of competition' found to exist" (*ibid.*). It further said that the courts have sustained only prohibitions of the Commission which run against conduct "found to be unlawful" (R. 3907). Since the Commission in the instant case had not passed upon the question whether the individual action prohibited by its order violates the Federal Trade Commission Act, the court held that this prohibition was beyond the Commission's authority and invalid (R. 3908–9).

SUMMARY OF ARGUMENT

The Commission, having found that since 1934 the respondents had sold their goods at prices determined by an agreed upon zone delivered price system which resulted in an exact matching of each others' delivered

prices, and that this constituted an unfair method of competition unlawful under Section 5 of the Federal Trade Commission Act, concluded that, in view of the price system's basic simplicity and respondents' long prior adherence to it, it might continue indefinitely without overt agreement. The Commission therefore concluded that actual, as against merely *pro forma*, termination of respondents' unlawful conduct could not be achieved unless the Commission, in addition to prohibiting agreement to use such zone delivered price system, also prohibited each respondent from using a zone delivered price "system" which resulted in "systematically matching" the prices of the other respondents.

The latter prohibition, the legality of which is the sole issue before this Court, clearly bears "reasonable relation" to the violation of the Act found to exist and represents an "allowable judgment" by the Commission with respect to the appropriate and necessary remedy to terminate such violation. *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608, 611–613. The prohibition is therefore valid unless the statute impliedly withholds from the Commission any authority whatever to prohibit conduct not found to be illegal in the proceeding on which the Commission's order was based.

The statute grants the Commission unqualified power to "*prevent*" unfair methods of competition and to issue orders directing those found to have used such methods to "cease and desist" therefrom. The implied limitation on the Commission's authority urged by respondents is contrary to the holding of this

Court in *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470, 473–474. Moreover, it is settled that the Federal Trade Commission and other administrative agencies clothed with comparable statutory authority have powers of prohibition of the same scope as those which a court may exercise when issuing injunctions against statutory violations. When we look to the decisions of this Court dealing with the permissible scope of judgments entered by federal district courts against violators of the antitrust laws, we find many decisions approving judgments which imposed prohibitions and limitations on conduct not in itself illegal or adjudged to be such, to the end that the defendants' past misconduct, and its renewal or revival, be effectively barred.

The prohibition which respondents attack may also be justified as being, in substance, a ban against what would be conspiracy as a matter of law, in that pricing according to a "system", with the effect or purpose of "systematically matching" prices of competitors, would be so linked with their prior agreement to price in this way that it would go beyond the "conscious parallelism" of action which, while evidence of conspiracy, is not of itself conspiracy. Furthermore, when the existence of a continuing conspiracy has been established, abandonment will not be presumed in the absence of "definite proof" thereof. Here, the contested prohibition of the Commission's order merely makes explicit the only definite proof of abandonment which is meaningful—pricing individually on a basis different from the "arbitrary and artificial" pricing system which respondents have used in the past.

ARGUMENT

THE COMMISSION, IN ENTERING ITS ORDER REQUIRING RESPONDENTS TO CEASE AND DESIST FROM FURTHER VIOLATION OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT, DID NOT EXCEED ITS STATUTORY AUTHORITY BY INCLUDING A PROHIBITION, FOUND TO BE ESSENTIAL TO PREVENT FURTHER VIOLATION, DIRECTED AGAINST CONDUCT NOT DETERMINED BY THE COMMISSION TO BE EITHER LAWFUL OR UNLAWFUL

The Commission agrees with the statement of the court below that an administrative body such as the Commission may exercise only such powers, including prescription of the remedy, "as are granted to it by statute" (R. 3905). The Commission's relevant statutory powers are those conferred by Sections 5 (a) and 5 (b) of the Trade Commission Act. Section 5 (a) empowers the Commission to "prevent" the use of unfair methods of competition and Section 5 (b) authorizes it, after finding that such an unfair method has been or is being used, to enter an order requiring the offender "to cease and desist" from using such method. No other statutory provision limits the power thus broadly conferred.

The Commission is clothed with wide discretion in determining the prohibitions requisite to bring violations to a stop. In *Jacob Siegel Co.* v. *Federal Trade Commission,* 327 U. S. 608, where the petitioner sought modification of an order entered in a proceeding under the Trade Commission Act, this Court stated (pp. 611–612):

> The Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices in this area of

> trade and commerce. Here, as in the case of orders of other administrative agencies under comparable statutes, judicial review is limited. It extends no further than to ascertain whether the Commission made an allowable judgment in its choice of the remedy.

The Court also said (pp. 612–613) that the Commission "is the expert body to determine what remedy is necessary", and that it has "wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist."

The doctrine of the *Siegel* case was reaffirmed in *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, 726, and *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470, 473. In the *Cement Institute* case, the Court, in upholding the Commission's order, gave as a reason for rejecting objections to its terms that "the prohibitions in the order forbid no activities except those which if continued would directly aid in perpetuating the same old unlawful practices." 333 U. S. at 727.

Courts of appeals have given similar wide breadth to the scope of conduct which the Commission may prohibit in orders directed against violation of Section 5 of the Trade Commission Act.[4] *E. g., Con-*

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[4] *Salt Producers Assn* v. *Federal Trade Commission*, 134 F. 2d 354 (C. A. 7), upon which the court below relied (R. 3908), is an earlier decision by that court. We believe that the actual holding in that case and its application to the present case are far from clear. See 134 F. 2d at 357–358. In any event, the relevant part of the opinion cites no authorities, and it advances no ground for decision not more fully set forth in the court's opinion in the instant case.

sumer Sales Corp. v. *Federal Trade Commission,* 198 F. 2d 404, 408 (C. A. 2), certiorari denied, 344 U. S. 912; *Independent Directory Corp.* v. *Federal Trade Commission,* 188 F. 2d 468, 470 (C. A. 2); *Hershey Chocolate Corp.* v. *Federal Trade Commission,* 121 F. 2d 968, 971–972 (C. A. 3).

In this case, the grounds for the paragraph of the order directed against individual action are not left to surmise; they are stated in the Commission's opinion. The opinion notes that maintenance of the delivered price zones and quotation of delivered prices therein "constituted the very cornerstone of the respondents' conspiracy", and that it was through adherence to this pricing system that "the matching of prices, one of the objectives of the conspiracy, was accomplished" (R. 3815). The opinion noted that sale at the same delivered price to all purchasers within a given zone and use of precisely the same zones by all the respondents resulted in eliminating price competition (R. 3814). The Commission concluded that this noncompetitive pattern of pricing, continued unchanged since 1934, could not be effectively brought to an end unless its order also included a prohibition against individual use of the device by which price competition had been eliminated (R. 3816–17).[5]

There can be no doubt, therefore, that the Commission exercised an "allowable judgment" in determining that the prohibition against individual action was needed to secure actual, rather than mere *pro forma,* termination of respondents' illegal conduct. It is

[5] Reasons stated by the Commission for its conclusion are set forth in the Statement (*supra*, pp. 6–7).

altogether likely that respondents, without such prohibition, will continue to sell on a noncompetitive basis by pricing in the same way as before, purportedly "without agreement on the subject but merely because it was individually to their best interests to do so" (see *supra*, p. 8). Respondents' noncompetitive pricing, in plain conflict with the policy of the antitrust laws, would then continue indefinitely or at least until a new conspiracy case had been prosecuted to final decision.[6] Avoidance of such a result furnishes warrant for applying "the only practical remedy against continuation of illegal trade practices." *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 186.

Still other considerations justify the presently contested prohibition, which bars each respondent from selling at prices determined pursuant to a zone delivered price "system" for the purpose or with the effect of "systematically" matching the delivered prices of other sellers. Continued use by the respondents of such "system" would be so linked with their past use of this system as to be a *de facto* continuation of concerted action. In the circumstances, such action would go beyond the mere "conscious parallelism" which, while evidence of conspiracy, is not conspiracy *per se* (*Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U. S. 537, 541). Indeed, the court below said that it did not believe that "the protective mantle of 'conscious parallelism'

[6] The instant case, which was instituted in 1944 (*supra*, p. 6), illustrates the long lapse of time that there may be between commencing such a proceeding and final decision.

can clothe with immunity a system employed by substantially all members of an industry whereby all offer their products for sale at any given time and any given point throughout the nation at identical prices" (R. 3895).

There is further warrant for the Commission's order by reason of the established rule that when the existence of a continuing conspiracy has been established, "[i]n the absence of definite proof to that effect, abandonment will not be presumed". *Local No. 167* v. *United States*, 291 U. S. 293, 298. In substance, the contested prohibition merely makes explicit respondents' obligation to furnish "definite proof" of abandonment of concert of action in maintaining a pricing system which the court below deemed "so arbitrary and artificial as to negative an inference of innocent parallel behavior" (R. 3895).

Respondents contended in their brief in opposition (p. 9) that the Commission has no statutory power to include within the prohibitions of its order conduct as to which the Commission has made no determination of illegality. We submit that the law is settled otherwise. In *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470, the Commission had found that the respondent's discounts of 5% or more constituted price discriminations prohibited by Section 2 of the Clayton Act. (15 U. S. C. 13). There was no finding by the Commission that discounts of less than 5% violated Section 2, but the Commission's order prohibited sale at any discount whatsoever. This Court nevertheless sustained the broad injunction

against discounts, ruling that the Commission "was not required to limit its prohibition to the specific differential" shown to have been illegal, and was not required to leave the respondent free to grant discounts of less than 5% and thereby opportunity to "frustrate the whole purpose of the proceedings and the order." 343 U. S. at 474.

Respondents in their brief in opposition (pp. 8–9) state that the issue here presented is whether the Commission is authorized to include within the prohibitions of its order a ban against "a *lawful* pricing method", "lawful action", "*lawful* conduct". But the conduct banned by the contested paragraph of the order is, at best, of doubtful legality. What is prohibited is sale pursuant to a zone delivered price "system" which results in "systematically matching" the prices of other sellers. The Commission has held that individual use of such a pricing method, with knowledge that the other members of the industry did likewise, is an unfair method of competition violative of Section 5, and the Commission's order prohibiting such conduct was upheld.[7] *Triangle Conduit & Cable Co.* v. *Federal Trade Commission,* 168 F. 2d 175, 176, 180–181 (C. A. 7), affirmed by an equally divided Court, 336 U. S. 956 (*sub nomine, Clayton Mark Co.* v. *Federal Trade Commission*).

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[7] In the *Triangle Conduit* case, identity in delivered prices was achieved through a basing point delivered price system, whereas in the present case such identity is achieved through a zone delivered price system. But if there is any distinction between the two systems from the standpoint of legality, respondents' zone delivered price system is the more clearly illegal (see R. 3815–6).

The prohibition which is in issue before this Court clearly bears "reasonable relation to the unlawful practices found to exist", the test applied in the *Siegel* and *Ruberoid* cases. It is equally clear that the Commission exercised an "allowable judgment" respecting the remedy when it concluded that this prohibition is requisite in effectively bringing these unlawful practices to a halt. The prohibition therefore fails only if the statute impliedly withholds from the Commission power to ban conduct not found to be unlawful in the proceeding leading up to the order, no matter how great the need for such prohibition in order to stop the conduct found to be unlawful.

We submit that there is no such implied limitation on the Commission's powers. This Court has held that when a statute authorizes an administrative agency to issue orders to prevent violation of its provisions, the agency has the same power to determine the scope of the needed prohibitions as a court may exercise in issuing injunctions to prevent statutory violations. In *May Stores Co.* v. *National Labor Relations Board*, 326 U. S. 376, this Court, in reviewing an order of the Labor Board, said (pp. 390–392):

> The test of the proper scope of a cease and desist order is whether the Board might have reasonably concluded from the evidence that such an order was necessary to prevent the employer before it "from engaging in any unfair labor practice affecting commerce." § 10 (a). Equity has long been accustomed in other fields to reach conclusions as to the scope of orders which are necessary to prevent interferences

> with the rights of those who seek the courts' protection. Injunctions in broad terms are granted even in acts of the widest content, when the court deems them essential to accomplish the purposes of the act. *We think that the Board has the same power to determine the needed scope of cease and desist orders under the National Labor Relations Act that courts have, when authorized to issue injunctions, in other litigation.* [Emphasis supplied.]

The statutory authority of the Labor Board and that of the Federal Trade Commission are, in the present respect, practically identical.[8] Moreover, this Court has said (with citation of cases involving orders of the Labor Board) that the limits on judicial review of the Trade Commission's determination of the remedy appropriate to prevent further violation are like the limits on judicial review of "orders of other administrative agencies under comparable statutes". *Jacob Siegel Co.* v. *Federal Trade Commission, supra,* at pp. 611–612.

Of course, the prohibitions incorporated in orders of an administrative body, like those imposed by the judgment of a court, must meet the test of having rational relationship to the objective of terminating the misconduct which has been found or adjudicated.

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[8] Section 10 (a), 29 U. S. C. 160 (a), of the National Labor Relations Act empowers the Labor Board to "prevent" any person from engaging in an unfair labor practice, and Section 10 (c), 29 U. S. C. 160 (c), authorizes the Board, if it finds after a hearing that there has been an unfair labor practice, to issue an order requiring the offender to cease and desist from "such" unfair labor practice.

And violation of a statutory command which is specific in character does not warrant prohibiting violation of a different and much more comprehensive command of the statute. *May Stores* case, *supra*, 326 U. S. at 392–393; *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426.

While the opinion in *Arrow-Hart & Hegeman Electric Co.* v. *Federal Trade Commission*, 291 U. S. 587, 598–599, may seem to imply that the Federal Trade Commission's powers of prohibitions are narrower than those of a court, the opinion is to be read in the light of the fact that the Court construed Section 11 of the Clayton Act (15 U. S. C. 21) as specifying the relief which the Commission might grant if it found a violation of Section 7 of the Act (15 U. S. C. 18), namely, to require the offender to "divest itself of the stock held" contrary to the provisions of Section 7.[9]

We believe, therefore, that the powers of prohibition accorded the agency by the Federal Trade Commission Act are substantially equivalent to those which courts exercise when entering judgment against violators of the antitrust laws.[10] It is, accordingly, significant that this Court has frequently upheld judg-

[9] There was substantial dissent both in this case and in the like decision in *Federal Trade Commission* v. *Western Meat Co.*, 272 U. S. 554. In the former, Chief Justice Hughes and Justices Brandeis, Stone, and Cardozo dissented; in the latter, Chief Justice Taft and Justices Holmes, Brandeis, and Stone dissented.

[10] By Section 4 of the Sherman Act, 15 U. S. C. 4, the several federal district courts are vested with jurisdiction to "prevent and restrain" violations of the Act.

ments imposing obligations or limitations on lawful conduct where such requirements were deemed necessary or appropriate to securing effective relief.

In *International Salt Co.* v. *United States,* 332 U. S. 392, the defendant had leased patented machines with tying provisions found to be illegal under Section 3 of the Clayton Act and Section 1 of the Sherman Act. The judgment required the defendant to offer its machines for lease or sale on terms which would be uniform at any one time, *i. e.,* non-discriminatory.[11] In answer to the appellant's contention that "the injunction should go no further than the violation or threat of violation", this Court, in affirming judgment, said (p. 400):

> When the purpose to restrain trade appears from a clear violation of law, it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed.

Other decisions have affirmed judgments which have required a defendant who theretofore had only leased his product to offer it for sale. *Besser Manufacturing Co.* v. *United States,* 343 U. S. 444, 447; *United States* v. *United Shoe Machinery Corp.,* 110 F. Supp. 295, 349–350 (D. Mass.), affirmed *per curiam,* 347 U. S. 521. This Court has also approved numerous judgments providing for compulsory licensing of patents under prescribed limitations in cases in which it was determined that the defendants had, by means of patent license agreements, fixed prices, allocated

[11] Non-uniform prices are ordinarily permissible under the Sherman Act, and they are lawful under Section 2 of the Clayton Act unless they have the anticompetitive or monopolistic effect set forth in that section.

markets, or monopolized trade. *Hartford-Empire Co.* v. *United States,* 323 U. S. 386, 413–418; *United States* v. *National Lead Co.,* 332 U. S. 319, 335–351; *United States* v. *U. S. Gypsum Co.,* 340 U. S. 76, 93–94, 100–103; *Besser Manufacturing Co.* v. *United States,* 343 U. S. 444, 447.

The judgments to which we have referred required action not compelled by any statutory provision. They barred use of property which, apart from the judgments, was lawful, *i. e.,* to lease or sell at non-uniform prices, to dispose of property by lease rather than by sale, to refuse to license a patent or to license it at more than a reasonable royalty. Certainly there is no difference in principle between prohibiting conduct not determined to be unlawful—the situation here—and prohibiting (except under specified restrictions) a lawful use of property. In either case the end sought is to secure discontinuance of past misconduct and dissipation of its effects.

United States v. *Bausch & Lomb Co.,* 321 U. S. 707, upheld a prohibition against conduct assumed to be lawful. The defendant Soft-Lite Lens Company had sold its goods under a distribution system which was found to constitute an illegal agreement to fix and maintain resale prices. The defendant, after passage of the Miller Tydings Amendment to the Sherman Act (50 Stat. 693), had entered into many resale price maintenance contracts which this Court assumed to be strictly within the terms of that amendment and therefore not illegal under the Sherman Act. The Court nevertheless sustained judgment provisions which not only prohibited enforcement of the existing

"fair trade" contracts but also the making of any new ones for a six-month period. 321 U. S. at 723–724.

In the instant case, the Commission recognized that the prohibition running against the respondents individually might well be warranted or required for only an interim period. The Commission envisaged this prohibition as a necessary means of wiping the slate clean, of bringing into being individual pricing structures and policies which would not be a mere perpetuation of the past illegal price system. The Commission said (R. 3817): "If after competition is restored any of the respondents can make a proper showing to the Commission that this prohibition or any other prohibition in the order is no longer necessary or desirable, the Commission will, of course, at that time take such action as may be appropriate in the light of the facts and the law." Moreover, affirmance of the Commission's order by the reviewing court would not deprive the Commission of jurisdiction to entertain an application to modify or to vacate the prohibition. *American Chain & Cable Co.* v. *Federal Trade Commission,* 142 F. 2d 909, 911–912 (C. A. 4).

This Court, in passing upon the permissible scope of the prohibitions imposed on violators of the antitrust laws, has not applied legalistic or mechanical tests, but rather flexible tests appropriate to the myriad situations which may arise. The Court has recognized that in this field, involving statutes designed to protect the general public as well as those engaged in making, selling, and distributing goods in commerce, there should be no niggardly approach to the question of the scope of permissible relief. The judg-

ment "should be broad enough to prevent evasion" (*Local 167* v. *United States,* 291 U. S. 293, 299); it should be framed "so as to suppress the unlawful practices and to take such reasonable measures as would preclude their revival" (*Ethyl Gasoline Corp.* v. *United States,* 309 U. S. 436, 461); it may "prohibit acts which in another setting would be unobjectionable" (*Hartford-Empire Co.* v. *United States,* 323 U. S. 386, 409); it should, so far as practicable, cure the ill effects of the illegal conduct, and assure the public freedom from its continuance" (*United States* v. *U. S. Gypsum Co.,* 340 U. S. 76, 88); it should be of sufficient breadth to "effectively pry open to competition a market that has been closed by defendants' illegal restraints" (*International Salt Co.* v. *United States,* 332 U. S. 392, 401).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed, with directions to affirm and enforce that part of paragraph 6 of the Commission's order which has been set aside.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
VICTOR R. HANSEN,
Assistant Attorney General.
CHARLES H. WESTON,
Attorney.

EARL W. KINTNER,
General Counsel,
ROBERT B. DAWKINS,
Assistant General Counsel,
Federal Trade Commission.

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